FILED BY CLERK
APR 22 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT ANGEL ROBLES, Appellant.	2 CA-CR 2007-0393 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071713

Honorable John S. Leonardo, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, Robert Robles was convicted of robbery, and the trial court sentenced him to an enhanced, substantially mitigated prison term of six years. On appeal, he argues the court erred by (1) admitting evidence of a "show-up" identification and permitting the victim to identify him in court, (2) giving a jury instruction that misstated the law, (3) finding he had two prior felony convictions for sentence-enhancement purposes, and (4) failing to recommend his sentence be commuted. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On an April afternoon in 2007, the victim, C., was sitting at a bus stop in Tucson when Robles approached her and grabbed her handbag. C. resisted but, after a struggle, the strap broke, and Robles ran off with the bag. A number of bystanders gave chase and ultimately detained Robles until a Tucson police officer arrived a few minutes later. The officer handcuffed Robles and placed him in the back of his patrol car. C. was driven to the location by a second officer, Sergeant Callan, and C. identified Robles after he was taken out of the patrol car. Robles was charged with one count of robbery and found guilty as charged. Following a bench trial on the state's allegation of prior convictions, the court found the state had proved two historical prior felony convictions and sentenced Robles as noted above.

Discussion

Identification

¶3 Robles first argues the trial court erred in denying his motion to preclude C. from identifying him in court based on her identification of him on the day of the robbery.[1] Pursuant to *State v. Dessureault*, 104 Ariz. 380, 383-84, 453 P.2d 951, 954-55 (1969), the state may not use an unduly suggestive identification procedure as the foundation for an in-court identification of a defendant. "We review the fairness and reliability of a challenged identification for clear abuse of discretion." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002).

¶4 Here, the trial court ruled that the "show-up" procedure was inherently suggestive but that it would not taint C.'s in-court identification.[2] On appeal, Robles argues only that C. was not a credible witness because portions of her testimony at the *Dessureault* hearing on his motion contradicted the account of Sergeant Callan, who also testified at the hearing. On this issue, however, we "must defer to the trial court's evaluation of the

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[1]Although Robles also contends evidence of C.'s identification of him at the "show-up" should itself have been suppressed, he fails to present any facts to make the necessary showing that, "under the 'totality of the circumstances' the identification was [un]reliable." *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *see State v. Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002) (listing *Biggers* factors). Rather, as he does in arguing that the in-court identification should have been precluded, Robles relies entirely on his assertion that C. was not a credible witness. And a complaint regarding the credibility of an identification is a matter for the jury to consider. *State v. Prion*, 203 Ariz. 157, ¶ 18, 52 P.3d 189, 193 (2002).

[2]We also note that Robles does not challenge his in-court identification by two of the bystanders who had pursued him following the robbery, but who did not participate in the "show-up."

witness's credibility as only it was able to view h[er]." *State v. Hughes*, 13 Ariz. App. 391, 393, 477 P.2d 265, 267 (1970). And here, as Robles concedes, the court's denial of his motion "was based largely on [C.]'s testimony." We therefore defer to the trial court's finding that C. was a credible witness. *See State v. Moody*, 208 Ariz. 424, ¶ 81, 94 P.3d 1119, 1144 (2004).

¶5 In any event, the record does not support Robles's contention that C.'s testimony at the hearing was "utterly incredible." Robles cites two instances in which he claims C.'s testimony contradicted Callan's account of how the pretrial identification process had occurred. Specifically, he claims C. testified that Callan had "told her that she was being show[n] the person that had robbed her" and that Robles "was brought in a patrol car to be identified by her, and that she was not driven in a patrol car to identify [him]." Although C.'s hearing testimony was not entirely clear, she expressly denied that Callan had "tr[ied] to tell [her] that [Robles] was the person [who] had taken [her] purse." The hearing testimony of both Callan and C. suggested that C. and Robles were both taken to the scene of the identification, a distance of "maybe 15 or 20 yards," according to C., or "about 50 to 70 yards," according to Callan, from the bus stop where the robbery had occurred. We are not persuaded that the disparity in their testimony was so great that "[t]here was absolutely no reason for the trial court to find [C.'s remaining testimony] credible," as Robles contends.

Jury instructions

¶6 Next, Robles argues the court gave the jury an instruction that misstated "the presumption of innocence and the burden of proof and impermissibly commented on the

evidence" in violation of the Arizona Constitution. We review de novo constitutional issues and whether a jury instruction properly states the law. *Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d at 1140 (constitutional issues); *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (jury instructions). Because Robles did not object to the challenged instruction at trial, we review for fundamental error only.[3] *See State v. Simpson*, 217 Ariz. 326, ¶ 12, 173 P.3d 1027, 1029 (App. 2007). "But, before we engage in fundamental error analysis, we must first find error." *State v. Herrera*, 203 Ariz. 131, ¶ 22, 51 P.3d 353, 359 (App. 2002). We will not find reversible error unless "a jury would be misled by the instructions when taken as a whole." *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

¶7 Here, the trial court instructed the jury as follows: "The number of witnesses testifying on one side or the other is not alone a test of the witness's credibility or the weight of the evidence." Robles asserts the use of the word "alone" in this instruction shifted the burden of proof because it "necessarily conveyed that the number of witnesses on each side was certainly a significant test of a witness's credibility." He contends the instruction informed the jury "that [he] was presumed innocent until the State produced more witnesses than he did."

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[3]Robles suggests any error was structural, mandating reversal, because the instruction "diminishe[d] both the meaning of reasonable doubt and the presumption of innocence." However, the instruction at issue was entirely separate from the court's reasonable doubt instruction, which Robles has not challenged. And, as our supreme court has noted, the United States Supreme Court has only found structural error in jury instructions where the reasonable doubt instruction was itself defective. *State v. Torres*, 208 Ariz. 340, ¶ 11, 93 P.3d 1056, 1060 (2004).

¶8 However, even if this instruction misstated the law, as Robles claims, we do not agree with his assertion that it diluted the burden of proof and the presumption of innocence, and, by implication, that it compromised the jury instructions as a whole. *See id.* The instruction addressed how the jury should evaluate the evidence, not the burden of proof. And, immediately following the contested instruction, the jurors were also instructed that, "[i]f warranted by the evidence, [they] may believe one witness against a number of witnesses testifying differently."

¶9 Furthermore, the trial court gave the instruction at issue after it had concluded its discussion of reasonable doubt, during which it stated clearly that "[t]he State has the burden of proving the defendant guilty beyond a reasonable doubt." The court had also instructed the jury to "consider all of the[] instructions," to "start with the presumption that the defendant is innocent," and not to "conclude that the defendant is likely to be guilty because of his choices" in calling witnesses. Viewed in their entirety, therefore, the jury instructions adequately reflected the law and made clear that the state was required to prove Robles guilty beyond a reasonable doubt. We presume the jurors followed these instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). We thus find no error, much less fundamental error. *See Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268; *Herrera*, 203 Ariz. 131, ¶ 24, 51 P.3d at 360.

¶10 Nor do we find that the instruction constituted an improper comment on the evidence in violation of article VI, § 27 of the Arizona Constitution, which provides, in pertinent part: "Judges shall not charge juries with respect to matters of fact, nor comment

thereon, but shall declare the law." This constitutional provision "does not prevent the trial court from instructing the jury on the limited usage of the evidence." *State v. Spinks*, 156 Ariz. 355, 361, 752 P.2d 8, 14 (App. 1987). And, "[u]nlike a comment on the evidence, the . . . instruction d[id] not suggest to the jury that the evidence should lead them to any particular result." *State v. Rodriguez*, 192 Ariz. 58, ¶ 30, 961 P.2d 1006, 1012 (1998); *see also Babb v. State*, 18 Ariz. 505, 510, 163 P. 259, 261 (1917) (improper for instruction to "single[] out a certain witness and ma[k]e the acquittal of appellants depend upon his testimony").

Prior convictions

¶11 Robles next argues the state presented insufficient evidence to prove he had two prior felony convictions. He contends the Department of Corrections (DOC) records that were admitted only showed his "name, birthdate, and broad physical description" and were insufficient to prove his identity for purposes of using the records for sentence enhancement.

¶12 The state must prove a defendant's prior convictions for sentence enhancement purposes by clear and convincing evidence. *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). "In order to prove a prior conviction, the state must submit positive identification establishing that the accused is the same person who previously was convicted."[4] *Id.* ¶ 16. Although the "[m]ere identity of the defendant's name with that of the individual with the prior conviction is insufficient to show the actual identity of that person,"

[4]On appeal, Robles does not challenge the sufficiency of the evidence to prove the convictions themselves. *See Cons*, 208 Ariz. 409, ¶ 16, 94 P.3d at 615.

State v. Terrell, 156 Ariz. 499, 503, 753 P.2d 189, 193 (App. 1988), "a detailed physical description of [the defendant], including the fact that [he] has a [distinctive] tattoo" may be sufficient, *State v. Carreon*, 210 Ariz. 54, n.12, 107 P.3d 900, 911 n.12 (2005).

¶13 Here, the trial court was able to compare Robles, who was physically present, to the information contained in the DOC records, including photographs and details of tattoos and scars. In finding that Robles was the same person named in the records, the court also noted the birthdate in his booking information matched that in the records.[5] Although Robles objects that the photographs were not recent and that the name on the page including the photographs was written as "ROBLES, OBERT A.," the court found the photographic evidence persuasive. If reasonable people "may fairly differ as to whether certain evidence establishes a fact in issue[,] then such evidence must be considered as substantial." *State v. Miller*, 16 Ariz. App. 96, 99, 491 P.2d 485, 488 (1971). By this standard, the court reasonably could find that Robles was the person referred to in the DOC records.

Sentencing

¶14 Finally, Robles contends the trial court was "ignorant of its ability . . . to recommend commutation" and urges us to remand for resentencing. Pursuant to A.R.S. § 13-603(L), if a trial court "is of the opinion that a sentence that the law requires the court to

[5]Because the court had ample evidence to establish the DOC records referred to Robles, we are not persuaded by his argument that it "relied" on an apparently nonexistent social security number in finding Robles "is the same person referred to" in those records. Indeed, the court's minute entry indicates it found the "identification of the defendant ha[d] been met due to the photographs in [the records]"; the date of birth and social security number were merely "addition[al]" identification evidence.

impose is clearly excessive, [it] may enter a special order allowing the person sentenced to petition the board of executive clemency for a commutation of sentence." Here, the trial court imposed an enhanced but substantially mitigated sentence of six years, commenting that the sentence was "the least" it could impose and "far exceeded anything [Robles] should be receiving."

¶15 However, the language of the statute gives absolute discretion to a court to recommend commutation, and Robles does not argue otherwise. Moreover, he provides no authority that would permit this court to infer from the trial court's comments that it was unaware of its ability to make such a recommendation. On the contrary, we presume the trial judge knew the applicable law. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). We therefore find no abuse of discretion in the court's failure to recommend that Robles's sentence be commuted.

Disposition

¶16 For the reasons stated above, we affirm Robles's conviction and sentence.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge